CASE NO.: SA 4/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOE GROSS t/a JOE'S BEER HOUSE **APPELLANT**

And

PIETER ROHAN MEINTJIES **RESPONDENT**

CORAM: Mtambanengwe, A.C.J., Teek, J.A., *et* Shivute, A.J.A.

HEARD ON: 11/10/2004

DELIVERED ON: 15/12/2004

APPEAL JUDGMENT

MTAMBANENGWE, ACJ: This is an appeal from a judgment of Maritz, J, sitting as President of the Labour Court, which set aide the order of the District Labour Court given on 8 July 1999, dismissing the

present respondent's claim. Respondent in the matter before Maritz, J., is the former employer of Respondent before us.

The learned President of the Labour Court stated the essence of the dispute between the parties as:

> "Whether the termination of appellant's contract of employment by notice given in terms of section 47 of the Labour Act no. 6 of 1992 (the Act) constitutes a 'dismissal' as contemplated in s. 45(1) of the Act."

He added:

> "If it does, the respondent concedes that the dismissal was neither substantively nor procedurally fair and that he will have to pay the appellant an agreed amount of N$33 000,00 for the loss suffered as a consequence. Conversely if the

termination of his services is not a dismissal - as the District Labour Court held - the appeal must fail."

The matter started in the District Labour Court with the lodging of a complaint by respondent purportedly in accordance with the provisions of Part IV of the Act. It is clear that right from the start appellant took the stance that s. 45 and consequently s. 46(3) did not apply. The particulars of the complaint were stated as follows:

"UNFAIR DISMISSAL, EMPLOYEE WAS DISMISSED SUBSTANTIVELY AND PROCEDURALLY UNFAIR.
Short statement of relief claimed:
Compensation for unfair dismissal of at least 3 months + 6 days leave pay."

The parties in this matter put before the District Labour Court the following:

"STATEMENT OF AGREED FACTS AND THE CONTENTIONS OF COMPLAINANT AND RESPONDENT RESPECTIVELY

1. Complainant was employed by Respondent as a manager from 18 August 1995, until the contract of employment was terminated by Respondent on 16 September 1998. A copy of the letter from Respondent's legal practitioners of record to Complainant is attached marked 'A'.

2. Complainant's monthly salary at the date of the termination of his contract of employment was N$5 500,00.

3. Complainant was paid his salary up to 30 September 1998, one month's salary in lieu of notice in compliance with section 47(4)(a) of the Labour Act, Act No. 6 of 1992 ("the Labour Act"), three weeks severance allowance in compliance with section 52(1)(a) of the Labour Act, two days leave pay and given a certificate of service in compliance with section 51(1) of the Labour Act on 16 September 1998.

4. The reason given by Respondent for the termination of Complainant's service was that the employment relationship had deteriorated to such an extent that Respondent was not prepared to continue with the employment relationship.

5. Respondent contends that the contract of employment was terminated by Respondent in terms of section 47 of the Labour Act and that section 45 of the Labour Act therefore does not apply.

6. Complainant admits that Respondent had complied with section 47, but contends that section 45 applies to the termination of Complainant's contract of employment by Respondent, which is also an unfair dismissal within the meaning of section 45(1).

7. If the above Honourable Court should find that section 45 applies to the termination of Complainant's employment contract by Respondent:

   7.1 Respondent admits that he has not complied with section 45, in that there was no valid and fair reason for the Complainant's dismissal, which was also not in compliance with a fair procedure;

   7.2 Respondent admits that Complainant has been unemployed for more than six months and that the loss that Complainant has suffered is equivalent to six months salary, being the total sum of N$33000,00.

The parties request the above Honourable Court to order the payment of this amount to Complainant in terms of section 46(1)(a)(iii) of the Labour Act.

8. The parties request that the admissions contained in this document be entered on the record by the above Honourable Court in terms of section 5 of the Civil Proceedings Evidence Act, Act No. 25 of 1965."

It will be noted that the admission by appellant, in para. 7.1 of this statement is in line with the complaint lodged by respondent. In other words what appellant is saying is yes, I admit I had no valid and fair reason to terminate your employment, but because I complied with the provisions of s. 47 of the Act, the termination does not constitute a dismissal and so you have no reason to complain.

The District Labour Court came to a decision in favour of appellant's stance that s. 45 does not apply in the circumstances. In doing so that Court based its decision on certain passages in *Du Toit v Office of the Prime Minister*, 1996 NR 52, especially on p. 72 B – E, where O'Linn, J., concluded"

"The term 'termination' or 'Terminate' is used throughout in ss

47 – 52, read with s 53, and not the words 'dismissal' or

'disciplinary action'. In contrast, 'termination' or 'terminate' are not used at all in ss 45 and 46, but only the words 'dismissal' or 'disciplinary action'.

There is a presumption when interpreting statutes that the same words in the same statute bear the same meaning. See Steyn *Uitleg van Wette (supra* at 26*);* Cockram *Interpretation of Statutes (supra* at 143); Du Plessis *Interpretation of Statutes* at 127.

The words 'termination' or 'terminate' in ss 48 and 50, should therefore be presumed unless the context indicates otherwise, to bear the same meaning as in ss 47, 49, 51, 51.

'Terminate' in s 48 means precisely what it says and cannot logically be subject to the 'unfair dismissal' provisions of ss 45

and 46. Similarly, it seems that a 'collective termination' complying with s 50, cannot be subject to the 'unfair dismissal' concept and procedures provided in ss 45 and 46. If this is so then the words 'termination by notice', in s 47 should be presumed to bear the same meaning as in ss 48 and 50 and similarly be regarded as not being subject to the 'unfair dismissal' concept and procedures of ss 45 and 46."

(Emphasis mine)

Maritz, J., did not agree but came to the conclusion:

"Accordingly, I find that the word 'dismiss', where it is used in ss 45 and 46 of the Act, means the termination of a contract of employment by or at the behest of an employer and that, so interpreted, no conflict arises between those provisions and those of ss 47 – 53 of the Act. Dismissal by notice under

> s 47 terminates the contract of employment but: (a) if unfairly done, it will bring the provisions of ss 45 and 46 into play; and (b) if no or inadequate notice is given, the remedy provided for by s 53(a) will be available to an aggrieved employee."

At the heart of the debate in the Court *a quo* was the conclusion by O'Linn, J. in the *Du Toit* matter, *supra*, that:

> "The provisions of ss 45 and 46 are not applicable to terminations of contracts by notice duly given in terms of the contract of employment, or of a collective agreement or in accordance with s 47 and where all the provisions of ss 47, 49, 51 and 52 read with ss 69 – 72, are complied with",

which Maritz, J., found did not form part of the ratio *decidendi* of the *Du Toit* case. That finding was attacked on that basis in argument before Maritz, J., by counsel for respondent (Mr. Light), who further submitted that it was wrong. Both challenges were upheld by Maritz, J.: hence the phraseology of the first ground of appeal (and, in my view the only real ground of appeal in this matter) namely that the learned judge erred in law in that

> "1. He held that the finding of O'Linn P in the case of *Du Toit v Office of the Prime Minister* 1996 NR 52 (LC) (the *Du Toit* case) in terms of which it was concluded that:
>
> > 'The provisions of ss 45 and 46 are not applicable to terminations of contract by notice duly given in terms of the contract of employment, or of a collective agreement or in accordance with s 47 and where all the provisions of ss 47, 49, 51 and 52 read with ss 69 – 72, are complied with.'
> >
> > (hereinafter the *Du Toit* finding)

did not form part of the ratio *decidendi* of that case. The learned judge erred in coming to such a conclusion, because the *Du Toit* finding, did contribute to the ultimate result and/or was done in the course of reasoning, in order to come to a conclusion, *inter alia*, because:

1.1 the provisions of the Public Service Staff Code (referred to the *Du Toit* case) formed part of 'any term and condition of a contract of employment' (being the phrase used in section 45 of the Labour Act, 1992) of Du Toit's contract of employment' and

1.2 if the phrase 'whether or not notice has been given' (as used in section 45 of the Labour Act, 1992) rendered the provisions of the Public Service Staff Code subject to the provisions of section 45 of the Labour Act, 1992 (which O'Linn P held, was not the

case) then, even if there was compliance with the provisions of the Public Service Staff Code, it would still have rendered the termination of the services of Du Toit unfair;

1.3 had the learned judge found that the *Du Toit* finding was part of the *ratio decidenci* of the *Du Toit* case, he had to dismiss the appeal for the reasons mentioned (in relation to *stare decisis doctrine*) in the judgment."

With respect the other so-called grounds of appeal amount to an argument why Maritz, J. should not have "held that 'dismiss' where it is used in ss 45 and 46 of the Act, means the termination of a contract of employment by or at the behest of an employer and not (as he should have found) that the word 'dismiss' (in the context of section 45) means termination as a consequence of misconduct."

See: Hindjou v The Government of the Republic of Namibia, 1997 NR 112 at 113 – 115.

Mr. Heathcote, for the appellant, maintained in argument before us the stance that the giving of notice in terms of s 47 is the end of the matter, and that the reason thereof is irrelevant. He emphasized this point by saying that Maritz, J., was wrong in holding that what s. 47 entails is the giving of notice in the form of an offer and if it is accepted by the employee that is the end of the matter. On the contrary, he said, such notice is not an offer open to acceptance, the effect of the notice is to bring the contract to an end: if the "Act says subject to the provisions of this section an employer who intends terminating a contract of employment on a date whether before or after the date on which it would have ordinarily expired by virtue of a provision contained in such a contract of employment shall" the intention is to terminate on the date (specified in the notice). The fallacy in that argument, supported as it is by the quotation of the wording of s. 47, is that Mr. Heathcote ignores the subsumption that for an employer to give notice to terminate a contract of employment on a date other than the date on which in terms of the provision of the contract it would ordinarily have expired there would have to be a reason, otherwise one would appear to be making the untenable proposition that s. 47 gives the employer *carte blance* - the right to breach a contract of employment with

impunity. Subsection (6) of s 47 makes it clear that such a proposition is not intended, it provides:

"(6) The provisions of this section shall not be construed as preventing –

(a) Any of the parties to a contract of employment from providing in such contract a period of notice of equal durations for both parties which is longer than the period referred to in subsections (1);

(b) Any employer from waiving any right conferred upon him or her by the provisions of subsection (1) or (4);

(c) Any of the parties from terminating the contract of employment without the notice referred to in

> subsection (1) for any cause recognized by law as sufficient."

This makes it clear that the notice in terms of subsection (1) is the prescribed statutory minimum. Mr. Heathcote drew our attention to a Zambian case, and submitted that this case was in support of the proposition that once notice is given no reason need be given, in other words the employer who has given notice or has otherwise complied with the provisions of s 47 need not be subjected to the fairness challenge of section 45. The Supreme Court of Zambia held in *Zambia Privatisation Agency v Matale* (1995 – 97) ZR 157 (SC) at 161 G – I:

> "The respondent's services were terminated in accordance with the terms of a letter dated 8 September 1994. They purported to give a reason in that letter and they paid the respondent the terminal benefit which included three months' salary in lieu of notice. It was common cause that the contract of employment in the instant case did not provide for termination of employment by notice or pay in lieu of notice. Be that as it may we accept that the relationship here as we

said in *Contract Haulage v Kamayoyo* was that of mater and servant. The case before us was not one involving contravention of statutory procedures and disciplinary proceedings. The payment in lieu of notice was a proper and a lawful way of terminating the respondent's employment on the basis that in the absence of express stipulation every contract of employment is determinable by reasonable notice; see *McClelland v Northern Ireland General Health Services Board*. In the case of *Lumpa v Maamba Collieries Ltd* we said, 'It is the giving of notice or pay in lieu that terminate the employment. A reason is only necessary to justify summary dismissal without notice or pay in lieu'.

We agree with counsel for the appellant that the respondent's termination of service was not unlawful as he was paid in lieu of notice which is a lawful way of terminating a contract of

> employment. This ground of appeal succeeds." (My underlining.)

With respect, having regard to the sentences I have underlined, this judgment does not support counsel's contention. The present case is one which, by admission of appellant, involves contravention of statutory procedures. The position stated in *Matale's* case is the common law position regarding the relationship between master and servant which in this Country has now been altered by statute.

Mr. Heathcote has persistently criticized a passage in Maritz, J.'s, judgment where the learned president of the Labour Court is said to have equated notice in terms of s. 47 to an offer which the employee may expressly or tacitly accept. It is necessary to quote the passage in full as it is in that passage where the difference in interpretation of the word dismiss (dismissal) between O'Linn, J., and Maritz, J., is brought out clearly. This is what Maritz, J., said:

> "Finally, the Court in *Du Toit's*-case reasoned (at 74G-H) that '(t)he enactment of ss 47-52, read with ss 53, 69 –72, providing for the termination of contract by notice would be

superfluous and/or an exercise in futility and/or absurd if because of s 45, no valid and effective termination of employment can take place'. I should immediately point out that s 47 does not only provide for the termination of a contract of employment by an employer, but also by an employee. Termination by the latter in accordance with s 47 results in the termination of the employment relationship. Its promulgation in that sense is certainly not superfluous, absurd, etc. But it also serves an important purpose in so far as it allows for the termination of a contract of employment by notice under the hand of the employer. If such notice is either expressly or tacitly accepted by the employee, it is the end of the matter. So, for instance, when an employment relationship has irretrievably broken down, the employer may wish to terminate it by notice and the employee may be equally desirous to accept it. The conceivable reasons for

such a breakdown may be innumerable and may include those reflecting on the employee's conduct, character and performance. An employee, knowing that the employer had lost trust or confidence in him or her because of gross negligence or dishonesty may, given notice of termination by the employer, elect to accept that rather than to subject himself or herself to a disciplinary hearing. Termination by notice provided for in s 47 does not, however, place the employee at the mercy of the employer's will or whims. If the employer acts unfairly in terminating the employee's employment by notice, the employee need not abide by such conduct or accept the notice and is entitled to challenge the fairness of such termination under s 45 – as he or she may also do when his or her services are terminated at a disciplinary hearing.

Accordingly, I find that he word 'dismiss', where it is used in ss 45 and 46 of the Act, means the termination of a contract of employment by or at the behest of an employer and that, so interpreted, no conflict arise between those provisions and those of ss 47 – 53 of the Act. Dismissal by notice under s 47 terminates the contract of employment but: (a) if unfairly done, it will bring the provisions of ss 45 and 46 into play; and (b) if no or inadequate notice is given, the remedy provided for by s 53(a) will be available to an aggrieved employee." (my emphasis)

The following exchange took place between counsel and the court.

"COURT: When you say notice given in terms of the Act or in terms of the contract you are merely saying purportedly given in terms of the contract (or Act) and that leaves room

for the other party to say yes it (was) given correctly in terms of the contract (or Act) or it was not given correctly in terms of the contract (or Act).

MR HEATHCOTE: Yes. I agree with that statement, that must be correct, I am respectfully with Your Lordship."

From this it would appear that the quarrel with the word 'offer' as used by Maritz, J., in the above passage has no substance. However, Mr. Heathcote went on to say:

"Now in practice ... that might be totally (be) correct and if it is then accepted there will not be a District Labour complaint. But we are dealing here not with how it would work in practice, we are dealing here with what is the intent of and meaning as to the plain wording of section 47. That is with respect an entirely different issue and it is in that sense that I submit that the practical use of a piece of legislation, how it works out in practice cannot be use(d) with respect to

> interpret the very meaning of the section. Section 47 is clear, it says: 'If you give notice in terms of the Act the contract will come to an end' not if it is accepted or not accepted, yes the unlawfulness or fairness or whatever will lead the argument further. Now it is in that context My Lord that is the one way in which Justice Maritz could explain the meaning of dismiss, as he found it. If the meaning of dismiss is as was found in the *Du Toit* case, those issues do not arise. ... I concede that any dismissal is subject to the provisions of section 45, concede that ... because one cannot argue against the very wording of the Act." (my underlining)

Mr. Heathcote also accepted that dismissal is dismissal whatever you may call it, it all depends on the intention of the employer, he said.

The primary rule of interpretation is that one must, in construing an Act of Parliament, adopt the ordinary grammatical meaning of words as

used by the legislature unless such approach would lead to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a Court of law is satisfied the Legislature could not have intended.

See: *University of Cape Town v Cape Bar Council*, 1986(4) SA 903 at 913 I-J and the cases there cited. It is, I think, because, as Devenish states in Interpretation of Statutes 1st ed. at p. 26, "words do not have intrinsic meaning in language but their meaning is invariably determined by a concatenation of contextual factors", that the well-known rule of construction that words used in a statute should be read in the light of their context was envolved. These rules were comprehensively but briefly stated by Schreiner, J.A., in *Jaga v Donges N.O. and Another*, 1950(4) SA 653 (A) at 662G – 663A as follows:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the

> context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two part and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."

See also *Van Heerden and Another v Joubert N.O. and Others* 1994(4) SA 793(A) at 795 F – I.

It is not necessary to set out the relevant provisions of the Act because both O'Linn, J., and Maritz, J., reached their differing conclusions after full reference to those provisions, except that O'Linn, J., omitted any reference to s. 65(4)(b). I must however, refer to what O'Linn, J., said at 68G to 69A-C of the *Du Toit's* case after he set out the provisions of s. 50 of the Act, the learned President of the Labour Court said:

> "Counsel for the appellant contend that ss 45 and 46 are applicable to any contract terminable and terminated by notice, whether the notice is given in terms of any provision of the Labour Act or in terms of any condition of contract of employment or of a collective agreement. Counsel further submit that the Labour Court must focus on the 'employment relationship' created by the Labour Act, rather than the relationship as defined and regulated in the employment contract and which is subject to the common law, in the absence of labour legislation.
>
> Counsel relied heavily on a decision in South Africa by the Appellate Division in *National Automobile and Allied Workers' Union (now known as National Metalworkers Union of South Africa) v Borg-Warner SA (Pty) Ltd*., 1994(3) SA 15 (A) at 23C-D and 25E-J, where the said Appellate Division dealt with the 'unfair labour practice Jurisdiction of the Industrial Court' and the 'employment relationship created by the Labour Relations Act, Act 28 of 1956'.
>
> I have already indicated *supra* that our Labour Act differs in important, if not fundamental respects, from that of the South African Labour Relations Act and that decisions of South African Courts interpreting and applying that Act are not necessarily applicable to the Namibian situation governed in the first place by the Namibian Labour Act of 1992.
>
> However, the general statement in the National Automobile decision, supra, that 'the unmistakable intent of labour legislation generally is to intrude, or permit the intrusion of third parties on this relationship in innumerable ways', is certainly also applicable in Namibia.

> Counsel for the appellant appear to accept, as does counsel for the respondent, that the word 'dismissal' in s 45 is the key word which must be interpreted in the context of the other provisions of the Labour Act."
> (My emphasis.)

In referring to s. 50 of the Act one would have thought that the Learned President of the Labour Court in *Du Toit's* case would have had his attention drawn to section 65(4)(b) of the Act which is part of the context in which the word dismissal must be interpreted. I agree with Maritz, J., that had O'Linn, J.'s attention been drawn to section 65(4)(b) "he might well have come to a different conclusion on this issue which he in part described as one of 'profound difficulty and uncertainty' where a difference of opinion is justified (at p. 77D)".

In *NAFAU and 38 Others v United Fishing Enterprises*, Silungwe, P., declined to accept O'Linn, J., reasoning that a different fairness regime is provided to regulate s 50 terminations and, as Maritz, J., says "he expressly held that the term 'dismissal' is not confined to the termination of a contract of service on grounds of an employee's misconduct but that it may also encompass termination of a contract of service on grounds other than misconduct (at p. 10). He points out that the full court of the High Court also considered the termination of services without compliance with s. 50(1) as an unfair dismissal under s. 45 of the Act in

the case of *Visagie v Namibian Development Corporation*, 1999 NR 219 at 229 G and 230 E".

In his heads of argument Mr. Heathcote supports the reasoning in *Du Toit's* case. He points out that Maritz, J., read the conclusion reached by O'Linn, J., out of context and in isolation, because at p. 76 I O'Linn, J., made the following important statement:

> "Should that turn out to be a termination in effect and substance because of alleged misconduct, or because of the reason contained in subpara (2)(a) – (c) of s 45, then the termination, even if ostensibly a termination by notice, will amount to a dismissal, subject to the provisions of ss 45 – 45."

This statement is indeed important because it is a clear recognition by O'Linn, J., of the fact that whether or not ss. 45 or 46 is applicable is a matter of fact. To illustrate this I refer to the remarks in the judgment preceding that statement. The learned President prefixed that statement with the following (at 76F – H):

"It is necessary to emphasise that the interpretation preferred herein *supra*, does not prevent the application of the provisions of ss 45 and 46 in all circumstances. The protection of ss 45 and 46 will be available, as pointed out *supra*, in the following circumstances.

The employer, when giving notice of termination, is compelled by the provisions of s 51(1)(g) to provide the reasons for termination of employment in the so-called certificate of employment. If he fails to do so, the District Labour Court may issue an order to compel in terms of s 53(2). Failure to comply with such order would in turn be a criminal offence in terms of s 23 of the Labour Act."

The Act does not define the word "dismiss" or "dismissal", nor does it define the word "terminate" or "termination". In *Bridge v Campbell Discount Co. Ltd* [1962] All ER 385 at 394 Lord Radcliffe said:

> "Terminate is an ambiguous word, since it may refer to a termination by a right under the agreement or by a condition incorporated in or by a deliberate breach by one party amounting to a repudiation of the whole contract."

In the same judgment his Lordship stated at p. 394H:

> "An interpretation of the facts can be derived only from what we know of the parties' acts or from the issues established by their pleadings. There is nothing else to go by."

It is clear to me that when Mr. Heathcote said a dismissal is a dismissal whatever you may call it, or that everything depends on the intention of the employer, he was in fact saying that whether a termination in terms of, for example, s. 50 or 47 amounts to a dismissal depends on the facts

of each particular case and that determination cannot or should not be made in a vacuum. It follows that what was to be determined in the present case on the facts as put before the Court, or the issues established by the pleadings, to borrow Lord Radcliffe's words, was whether the termination of respondent's contract of employment in terms of s. 47 amounted to a dismissal.

The problem that clouded the arguments on behalf of appellant is of course the fact that the *Du Toit* judgment makes some categorical conclusions as to the applicability or otherwise of ss 45 and 46, which conclusions accord with appellant's stance. But despite Mr. Heathcote's declaration of support of the reasoning in *Du Toit's* case, he in his oral submissions appears to abandon any reliance on that case when he said:

> "... the fault that Mr. Justice O'Linn made and also that Mr. Justice Maritz made is laying down A or B and losing sight of the intention of the employer because that is paramount. Whether there is dismissal or not, in short – an issue of interpretation of statutes, it is an issue what is going on in the mind of the employer."

Mr. Heathcote went on to emphasize that what "is going on" in the mind of a person is a matter of fact which the court has to determine and the courts determine on a daily basis, for example whether a person had intent to kill or was negligent. He said if the conclusion by O'Linn, J., that section 45 and 46 are not applicable to termination of contracts by notice duly given etc, etc was "a finding of a court after he has listened to all the evidence, then one cannot fault this statement. But if it is something that is said to exclude (s. 45) in all circumstances, then it is not right because if one says "it was a termination it can still be a dismissal".

While I fully agree with this submission, the difficulty I have in this regard is counsel's application of it to the facts of this case. His approach to the facts is as follows (in his own words):

> "Now look what was the employee's contention. He says Complainant admits in paragraph 6 that Respondent has complied with Section 47, but contends that Section 45 applies to termination of Complainant's contract of employment by Respondent and then very important, which is also an unfair dismissal within the meaning of Section 45.1.

Now My Lord that must be wrong because and we come back to the issue where everything has been followed, the reason is given and all this employee says, he says but because 45 is also applicable and we say yes, it is applicable it there is a dismissal, then I must get N$33 000,00. So the statement approached by the employee was with respect ill conceived. Because what he says to Your Lordship, he does not contend that the provisions followed and the notice given by the employer was in fact a dismissal. He says only because 45 is also applicable it follows that I have been unfairly dismissed. But what he must first prove My Lord, is in terms of Section 46 that he was dismissed, not terminated in terms of 47. So as far as the Appeal is concerned, the Appeal with respect must concede on that basis because and then in paragraph 7 it is stated. 'If the above Honourable Court should find that Section 45 applies to the termination of the Complainant's

employment contract by Respondent, Respondent admits', it then continues. Not in general. If Section 45 applies to the termination of Complainant's employment contract, now no Court with respect My Lord could have made that founding on the agreed facts. Because the employer, the employee had to say I say 45 is applicable because what it in fact amounted to was dismissal not your 'thingy' (this thing) that you call a termination in 47. So the employee must fail and should have failed in the Court *a quo* as well because he never came so far as to allege or prove that he was dismissed and only then the presumption will kick in once he has proven that he has been dismissed and that My Lord, is the fundamental...".

Properly understood in this passage counsel is saying that the respondent did not first of all, allege that he was unfairly dismissed, secondly that the respondent merely says s. 45 applies and that merely because it applies he is entitled to N$33 000,00, and thirdly that

respondent did not prove he was dismissed, he had to start by proving that. With respect this is a distorted way of interpreting the respondent's position. The statement of agreed facts put before the District Labour Court must be read together with the particulars of the complaint lodged by the respondent (already quoted above). It was to that complaint that appellant was responding when he says in paragraph 7.1 of the statement "Respondent admits that he has not complied with section 45, in that there was no valid and fair reason for the complainant's dismissal which was also not in compliance with a fair procedure". In my view the statement of agreed facts read with respondent's particulars of complaint placed the matter squarely within the parameters of s 45 which provides in part as follows in subsection (1):

> "(1) For purposes of the provisions of section 46 but subject to the provisions of subsection (2) –
>
> (a) Any employee dismissed, whether notice has been given in accordance with any provision of this Act or any term and condition of a contract of employment or collective agreement.

(b) ....., without a valid and fair reason and not in compliance with a fair procedure shall be regarded to have been dismissed unfairly...",

and s. 46 which provides as follows in part in subs. (3):

"(3) When in any proceedings in terms of this section it is proved that an employee was dismissed from his or her employment or that any disciplinary action has been taken against such employee, it shall be presumed that, unless the contrary is proved by the employer concerned, such employee has been dismissed unfairly or ...".

Later in his replying submissions Mr. Heathcote conceded that he had overstated the position taken by him (respondent) when he said respondent had not alleged that he was unfairly dismissed and that there was no evidence to that effect. However, he maintained the assertion that respondent had not proved, as he should have done in the first place, that the termination of his contract was in fact a dismissal, respondent should have done so, he said, for the presumption to kick in. Counsel was of cause relying on subsection (3) of s. 46 (quoted above).

With respect it seems to me that the admission in para 7.1 of the statement of agreed facts read with the complaint lodged by respondent brings into operation the deeming provision in subs. (3) of s. 46. Why would he need any further proof when what appellant admitted amounted to an unfair dismissal; the issues were thus established right from start. Mr. Heathcote referred the Court to the case *Kloof Gold Mining Co. v National Union of Mineworkers*, 1987(1) SA 596 (TPD) where at p. 608 C-D Spoelstra, J., said:

> "If an individual employee has been dismissed in terms of his contract, the dismissal was *prima facie* fair and equitable. In the absence of any other facts there is no reason to suppose that the employer acted in an unreasonable or unfair manner.

> Generally speaking, a person who exercises his rights, and more so if they had been agreed to by the other party, acts in a fair and reasonable manner."

True as this statement may be generally speaking, I do not see how it could be of any assistance to the appellant in light of his admission to the contrary in the statement of agreed facts.

Unlike the court in *Du Toit's* case, the Court *a quo* in the present case was called upon to decide whether termination of respondent's contract in terms of notice in terms of s. 47 of the Labour Act constitutes a dismissal as contemplated in s. 45(1) of the Act. In deciding, the Court interpreted the words dismissal and terminate. Counsel for the appellant *inter alia* criticized this interpretation mainly on the ground on which counsel dwelt for a considerable length of time particularly in his oral submissions, namely that the Court *a quo* ignored the intention of the employer which he said was paramount in determining in each case whether a termination constitutes a dismissal. I do not agree that Maritz, J., ignored the intention of the employer the intention is shown in appellant's admission in paragraph 71 of the statement of agreed facts,

namely to terminate or dismiss by giving notice as he did "without a valid or fair reason" and not in compliance with a fair procedure.

To go further Maritz, J., found that the *Du Toit* judgment's conclusions on the applicability of ss. 45 and 46 was *obiter*. He briefly reviewed case law on what constitutes *obiter dicta* (see pp 19 – 22 of his judgment). With respect, I agree with that finding; a reading of O'Linn, J.'s, judgment bears support to Maritz, J's., comment that:

> "The ratio on which the Court allowed the appeal was that Mr. Du Toit's services had not been validly terminated as required by the Public Service Act and Code, in particular because 'the purported notice did not comply with the requirements of ss 3(d)(i), 3(d)(ii) of s. EXI of the Public Service Staff Code', because there was no assessment made on whether or not Du Toit's service would be gainful as envisaged s 10(1)(b)(vi) of the Code and because 'apparently no discretion was exercised to give reason for termination in accordance with para (1)(d)(v) of s 3 of chap EXI of the Code'. It follows that, once it

> found that Du Toit's contract of employment had not been validly terminated by notice or otherwise, it was no longer necessary for the Court to decide whether such a termination purportedly done under s. 47 of the Act amounted to a dismissal as contemplated in s. 45 thereof. Hence, the Court's finding that, upon a proper interpretation of the relevant sections of the Act, it was not, was an *obiter dictum* (compare also the approach of the Supreme Court in *Pieter Johan Myburgh v S*, unreported, Case no. SCA 21/2001 dd 14/10/2001, p. 45).

In the end Mr. Heathcote did not insist that this Court should follow the *Du Toit* judgment even if read in the context that it "decided that, provided the termination of an employee's contract is *bona fide* (in the sense that it is not given with hidden agenda or for reasons proscribed in subparagraph 2(a) - (c) of section 45), then, and only then the provisions of sections 45 and 46 are not applicable to the provisions of section 47".

In any case the *Du Toit* case contains a number of rulings on the issue before this Court some of them very tentative in nature.

In paragraph 17 of his written submission he referred to Rycroft and Jordaan, *A Guide to South African Labour Law* at p. 97 where the following passage appears:

> "Where the contract is for an indefinite period the employer is also allowed, in the absence of a serious breach by the employee, to terminate the contract by giving the employee due notice. But where the termination is for a reason proscribed by statute, it will remain unlawful despite the fact that proper notice may have been provided."

This passage, contrary to Mr. Heathcote's submission, points to the fact that, the giving of proper notice in terms of section 47 in the present matter, is not the end of the matter, the question still remains whether the termination is lawful.

Ms. Conradie who appeared for the respondent in this appeal submitted, correctly in my view, that whether or not the termination of the contract between respondent and appellant was a dismissal or a termination in terms of s. 47, an unfair dismissal in terms of s. 45, the whole question turns on the meaning of s. 47 in relation to s. 45 and 46. The question must be asked she said, does s. 47 give the employer so much liberty that he or she can say I can give an employee notice just because I don't happen to like him or her anymore etc. and if I comply with all the formal provisions of s. 47 then that is the end of the matter. If the argument – by counsel for the appellant were to stand that would leave the door wide open for employers to do whatever they like and the position of employees would be no better than it was before the Labour Act was introduced. She submitted that the notice in terms of s. 47 was indeed a dismissal which was neither substantively nor procedurally fair, but unfair because there was not any particularly good reason for it, "the employer wrote to the employee and said our relationship has broken down and there was no procedure followed, no hearing given, the notice was the end of the matter". Counsel referred to the case *Clarke v Ninion and Lester (Pty)* (1988) 9 ILJ 651 (IC) where at 655 – 656 it was said that the fact that an agreement allows an employer to give notice does not mean he can just do that out of a sense of whim, he still need to follow the procedures. A List of cases under the Unfair Labour Practice Jurisdiction in South African held that compliance with the common law or a statutory provision by giving notice does not mean that, the court is

precluded from examining whether a dismissal was unfair – See *Metal and Allies Workers Union and Others v Barlows Manufacturing Co Ltd* (1983) 4 ILJ 283 (IC) particularly the conclusion at 294A; *Gumede and Others v Richdens (Pty) Ltd t/a Richdens Foodliner* (1984) 5 ILJ 84 (IC) at 92D-E; *Nodlele v Mount Nelson Hotel and Another* (1984) 5 ILJ 216 (IC) at 223 I – 224 D; and *Clarke v Ninian and Lester (Pty) Ltd* (1988) 9 ILJ 651 (IC) at 655 E – 656 B.

In arriving at the meaning of the words dismiss, dismissal, terminate/termination, Maritz, J., adopted, *inter alia*, the contextual approach to interpretation of statutes, as stated by Schreiner, J.A., in the *Jaga and Bhama* matter, supra. The learned President of the Labour Court reasoned as follows:

> "Whilst I agree that the words "termination" and "terminate" generally bear the same meaning where used in the Act, it refers in a labour context to the legal effect of an act or event on the continuation of a contract of employment – their meaning does not in any way limit the manner in which such effect may legally be brought about or, for that matter, by whom it may be done. Whilst certain sections of the Act

envisage such termination to follow upon the happening of a particular event (cf. s 48) or by notice given by an employee (cf s 47(1)), others provide for it to be the consequence of an act by the employer. Section 50 is an example in point. If the collective termination of contracts of employment may only be brought about by employers and the word 'dismissal' means, according to the appellant, just that, why did the Legislature in this instance prefer to use the word 'terminate' and not 'dismiss'? Why did it not use the expression 'collective dismissal' and isn't that an indication that it intended the word 'dismissal' to have the more limited meaning favoured by O'Linn P?

The short answer is that it was at liberty to use any of the two – and that it used both when referring to the collective discharge of employees under s. 50. Although that section

only uses the word 'termination', s 65(4)(b), dealing with the functions of workplace union representatives, expressly refers to 'the dismissal of employees referred to in section 50' (emphasis added). This reference is, in my view, most significant. It strongly commends the notion that the Legislature intended the word 'dismiss' to bear the more general meaning of 'dismiss', i.e. an employee's discharge from service by or at the behest of the employer. Section 65(4)(b) militates against the more limited meaning attributed to the word by the Court in *Du Toit's* case because the discharge of an employee under s. 50, cannot, on any construction of that section, be considered as 'dishonourable'. On the contrary, if so discharged, the employee is a victim of circumstances beyond his or her control. Unfortunately counsel did not draw attention to the provisions of s 65(4)(b) – neither in this Court nor in *Du Toit's* case. Had it been done in

that case, O'Linn P might well have come to a different conclusion on this issue which he in part described as one of 'profound difficulty and uncertainty where a difference of opinion is justified' (at 77D).

I am fortified in this conclusion by the remarks of Silungwe P in *NAFAU and 38 Others v United Fishing Enterprises* (unreported Labour Court judgment in Case No. LCA 08/2001 dated 5/4/2002 at p. 7) who declined to accept the reasoning of O'Linn P that a different 'fairness regime' is provided to regulate s 50 terminations. He reasoned that the provision of a penal sanction in s 50(2) for non-compliance with the formalities prescribed in s 50(1) could not have been intended to deprive the affected employees of civil relief. Such relief is not available under s. 53 of the Act and he held that it is only to be found within the parameters of ss 45 and 46, i.e. when

such termination is also considered as a dismissal, the fairness whereof may be determined by a Court of Law. He expressly held that 'the term "dismissal" is not confined to the termination of a contract of service on grounds of an employee's misconduct but that it may also encompass termination of a contract of service on grounds other than misconduct' (at p 10). He points out that that the full court of the High Court also considered the termination of services without compliance with s 50(1) as an 'unfair dismissal' under s 45 of the Act in the case of *Visagie v Namibia Development Corporation*, 1999 NR 219 at 229G and 230C).

I agree. The criminal sanction provided for in s 50(2) is only aimed at an employer who contravenes for fails to comply with the procedure prescribed for in subsection (1). If a restrictive interpretation is given to 'dismiss' in ss 45 and 46,

it will not only leave the employees dismissed contrary to those provisions without civil recourse, but also those whose dismissal were substantively unfair, e.g. when an employer *mala fides* uses the guise of 're-organisation' to rid the business of targeted employees for impermissible reasons such as those mentioned in s 45(2) of the Act or apply methods of selection which are patently unfair.

It is only when the word 'dismiss' is interpreted to include any termination of a contract of employment by or at the behest of an employer that the notion of 'fairness', which lies at the heart of sound labour elations, is given its rightful place in the structure of the Act. Historically, the inequality in labour relations resulted in numerous unfair labour practices leading to industrial and political tension and conflict. The Act, according to its preamble, was adopted to further labour

relations conducive to economic growth, stability and productivity by, amongst others, promoting sound labour relations and fair employment practices. The concept of fairness permeates the objectives of the Legislature as they find expression in words used, the relationships envisaged and the structures and mechanisms, judicial and otherwise, created in the Act. Employers are required to treat their employees fairly and the converse holds equally true.

The restrictive interpretation given to the word 'dismiss' in *Du Toit's* case, detracts, with respect, substantially from that objective and gives rise to a number of difficulties – even injustices and absurdities. I have already referred to some of them in the context of s 50 of the Act. If I were to apply that interpretation to s 47, it would leave the door wide open for employers to terminate by notice the employment of

unwanted employees for no good reason at all. Cold, must be the comfort derived by an employee from the assurance in *Du Toit's*-case (at 76G-I) that he or she may still invoke the protection of ss 45 and 46 against unfair dismissal if the reason for the termination of his or her services as stated on a certificate of employment under s 51(1)(g) relates to misconduct or incapability. It would be easy for a less than frank employer to give a multitude of reasons unrelated to misconduct or incapability on the part of the employee for such termination, thereby avoiding the requirement of procedural and substantive fairness in s 45. It would be near impossible for an employee to prove that such a termination by notice in substance amounts to a dismissal and is subject to s 45. That interpretation will render the fairness requirement for dismissals illusionary. Take the example of an employer who wishes to get rid of a female employee because

of her gender (he simply does not wish to bear the additional burden of granting her maternity leave) or because he suspects that she had given certain information to the Labour Commissioner (or because of any other reason on account of which an employee may not be dismissed under 2 45(2) of the Act.) All the employer has to do to avoid the legal consequences of those provisions is to give her notice of termination, dishonestly invent an innocent reason for such termination and otherwise comply with ss 47, 49, 51 and 52 of the Act. The Legislature was, in my view, alert to the possibility that employers may wish to circumvent the requirement of procedural and substantive fairness demanded by s 45 in that manner. It is precisely for that reason that it expressly stipulated that s 45(1) would apply to all employees dismissed 'whether or not notice had been given in accordance with any provision of this Act…'. The only notices

> bearing on contracts of employment provided for in the Act are those referred to in ss 47(1) and 50(1)."

That interpretation of the two terms is supported by the comment by Cameron, Cheadle and Thompson in *The New Labour Relations Act* (the Law after the 1988 amendments) namely:

> "Dismissal is the termination of the employment relationship at the behest of the employer. Termination is the wider category encompassing the termination at the instance of the employee, the employer and the operation of law" (at 143).

Other academic writer comment to the same effect that dismissal is an action undertaken by an employer leading to a termination of the employment and like the Concise Oxford Dictionary, do not confine the definition of 'dismiss' to dishonourable discharge. As Ms. Conradie pointed out "all the sections in Part IV of the Act are concerned with the

termination of contracts of employment" as per the heading "Termination of Contracts of employment and unfair disciplinary action".

The Court *a quo* answered the question posed when it spelt out the essence of the dispute between the parties with reference to the facts or pleadings which were put before the District Labour Court. The Court also interpreted the words dismissal and termination in the context of the Labour Act as a whole. In the former instance it found support in sound precedents. I can find no ground to fault the Court's conclusions.

In the result the appeal is dismissed.

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MTAMBANENGWE, A.C.J.

I agree.

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TEEK, J.A.

I agree.

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SHIVUTE, A.J.A.

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